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IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA  
Statesboro Division

|                                  |   |                             |
|----------------------------------|---|-----------------------------|
| IN RE:                           | ) | Chapter 7 Case              |
|                                  | ) | Number <u>683-00116</u>     |
| DILLARD FORD, INC.               | ) |                             |
|                                  | ) |                             |
| Debtor                           | ) |                             |
|                                  | ) |                             |
| WILLIAM E. WOODRUM, JR., TRUSTEE | ) | FILED                       |
| AND DILLARD FORD, INC.           | ) | at 5 O'clock & 00 min. P.M. |
|                                  | ) | Date: 3-3-89                |
| Plaintiffs                       | ) |                             |
|                                  | ) |                             |
| vs.                              | ) | Adversary Proceeding        |
|                                  | ) | Number <u>687-0037</u>      |
| FORD MOTOR CREDIT CO. AND        | ) |                             |
| LUM M. PURVIS                    | ) |                             |
|                                  | ) |                             |
| Defendants                       | ) |                             |

**RECOMMENDATION OF FINDINGS OF FACT AND CONCLUSIONS**  
**OF LAW TO THE UNITED STATES DISTRICT COURT**

Defendants, Ford Motor Credit Co. (FMCC) and Lum M. Purvis (Purvis) have moved to dismiss the complaint of plaintiffs, William E. Woodrum, Jr., Trustee (trustee) and Dillard Ford, Inc., (debtor) on the grounds that the complaint fails to state a claim upon which relief may be granted.

Plaintiffs' complaint is cast in two counts and generally alleges a breach of contract and a conversion in tort against defendants. Count one of the complaint alleges that on

January 16,

1980, the debtor entered into an agreement with FMCC known as an "Automotive Finance Plan for Ford Motor Company Dealers" in which FMCC agreed to provide financing for debtor's inventory of vehicles (floor plan) and to purchase consumer retail installment contracts for financing of vehicles sold from the debtor's inventory. Pursuant to this agreement, a line of credit was established under which debtor and FMCC operated from January 16, 1980 until July 26, 1983, when the floor plan line of credit was increased to Fifty Thousand and No/100 (\$50,000.00) Dollars. Under the line of credit, FMCC authorized the debtor to issue site drafts against a FMCC account when a vehicle was sold and financed through a retail installment sale contract purchased by FMCC.

Plaintiffs contend that on or about August 29, 1983 in the normal course of business, debtor sold four vehicles. The four vehicles were financed under the agreement whereby FMCC purchased the retail installment sale contracts. The agreement also authorized the debtor to issue a site draft on the account of FMCC to pay the debtor for the vehicles sold from inventory. Following the issuance of site drafts, the debtor in the normal course of its business relationship with FMCC utilized the funds from the draft to operate its ongoing automotive dealership business. On August 31, 1983, FMCC by and through defendant Purvis, FMCC's duly

authorized branch manager and alleged agent, unilaterally and without reasonable advance notice, entered the premises of the debtor, terminated draft privileges, cancelled the line of credit established under the agreement and seized two of the August 29, 1983, retail installment contracts. The complaint further alleges that shortly after defendant Purvis left debtor's premises, he visited the offices of Pineland State Bank and effectuated the termination of debtor's line of credit and the freezing of debtor's accounts with the bank. According to the complaint, these actions constituted a breach of the implied covenant of good faith and fair dealing embodied in the contract between debtor and FMCC, causing the debtor damage and necessitating the debtor's filing for relief under the bankruptcy laws. Count one also alleges that the plaintiffs are entitled to recover consequential damages resulting from injuries sustained to its business reputation, good will and franchise value from this breach of contract.

Count two of the complaint alleges that FMCC continued to process the contracts seized from debtor on August 31, 1983 and to retain all of the proceeds from the payment on said contract thereby converting funds of the debtor to FMCC's own use. Additionally, count two alleges a violation of an order of the Honorable Herman W. Coolidge, Bankruptcy Judge, entered November 18, 1983, requiring FMCC to hold intact all funds presently held

by FMCC in a reserve account established for the purpose of satisfaction of defaulted retail installment contracts entered into by debtor and its customers and purchased by FMCC. Plaintiff contends that FMCC has drawn upon said reserve account and utilized said funds for its own purposes in violation of the order. The complaint essentially asserts a tort claim, a conversion. Count two characterizes the actions of FMCC as evidencing a want of care and a conscious indifference to the consequences of its actions which authorize the recovery of punitive, as well as compensatory damages. Count two contends that the conversion is an independent injury unrelated to the alleged breach of contract.

In response to the complaint, in accordance with to Bankruptcy Rule 7012 incorporating Federal Rule of Civil Procedure 12(b), the defendants filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b) (6), failure of the pleadings to state a claim upon which relief can be granted. The motion to dismpss is grounded upon the following arguments:

1. The complaint fails to state a claim under either 11 U.S.C. §541 or §542;

2. Neither Georgia law nor the Bankruptcy Code, Title 11 U.S.C., provides for an action for breach of an implied covenant of good faith and fair dealing;

3. Even if a cause of action for breach of an implied

covenant of good faith and fair dealing were recognized, the complaint fails to allege dishonesty in fact required for a showing of a breach of good faith;

4. Any obligation of good faith does not override an

expressed contractual term set forth in the Uniform Commercial Code as adopted in Georgia;

5. No breach of contract is alleged against defendant Purvis;

6. The complaint fails to state a claim in tort; and

7. The alleged tort claim fails to state any actual damages resulting from any alleged tort committed by defendants.

Before the motion can be resolved, this court must make a determination whether this adversary proceeding is a core proceeding or a proceeding that is otherwise related to a case under Title 11. 28 U.S.C. §157(b) (3). Whether this is a core-proceeding impacts directly upon the resolution of this motion by this court. Pursuant to 28 U.S.C. §157(e) (1), this court may hear proceedings that are non-core, but that are otherwise related to a Case under Title 11; however, this court is limited to hearing the matter and submitting proposed findings of fact and conclusions of law to the district court. Any final order or judgment must be entered by the district judge after

considering this court's proposed findings and conclusions, and after reviewing de novo those matters to which any party has timely and specifically objected. The core/non-core issue impacts not only upon the procedure for the entry of a final order on this motion, but also since the plaintiffs have demanded a jury trial, in which forum, the bankruptcy or district court, the case will proceed.

Plaintiffs contend that the cause of action alleged in the complaint arose prior to the filing of the underlying bankruptcy proceeding; therefore, upon the bankruptcy filing this cause of action became property of the estate pursuant to 11 U.S.C. §541. The Plaintiffs contend that as the damages resulting from the alleged breach and conversion constitute property of the estate, and as this property interest is being held by the defendants, section 542 authorizes this action to force the turnover of this property. Pursuant to 28 U.S.C. §157(b) (2) (E), what is sought is a judgment determining the value of the property interest of the estate, liquidating the claim to a sum certain by entry of judgment and ordering the turnover of this liquidated property interest, money, to the estate, which is a core-proceeding.

This court disagrees. Although 11 U.S.C. §157(b) (3) provides "a determination that a proceeding is not a core-proceeding shall not be made solely on the basis that its

resolution may be affected by State law", in this case, but for the filing of the bankruptcy proceeding the cause of action asserted is clearly based solely upon State law. What is asserted in the complaint is breach of contract and a conversion claim which are merely related to the underlying bankruptcy case. See, Northern Pipeline Co. v. Marathon Pipeline Co., 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed. 2d 598 (1982) (breach of contract action); In re: Morse Electric Company, Inc. 47 B.R. 234 (Bankr. N.D. Ind. 1985) (breach of contract, bad

faith injury to business and negligence were "related" proceedings); In re: Bokum Resources Corp., 49 B.R. 854 (Bankr. N.M. 1985) (breach of contract issue was only "related" to the bankruptcy case). Clearly, the allegations of the complaint fall within the types of causes of action identified as related to the bankruptcy case and are, therefore, non-core proceedings. As non-core matters, this court may only recommend findings of fact and conclusions of law to the district court for final determination.

In considering this motion to dismiss for failure to state a claim, the question is whether in the light most favorable to plaintiffs, and with every doubt resolved in their favor, the complaint fails to state any valid claim for relief. Corley v. Gibson, 355 U.S. 41, 78 S. Ct. 99, 2 L.Ed. 2d 80 (1957) Jenkins v. Keithen, 395 U.S. 411, 89 S. Ct. 1843, 23 L.Ed. 2d 404

(1969); In re: Fidelity Electric Co., 19 B.R. 531 (Bankr. E.D. Pa. 1982); Manning v. Bd. of Public Instruction of Hillsborough County Florida 277 F.2d 370 (5th Cir. 1960); 5 C. Wright & A. Miller, Federal Practice and Procedure §1357 [hereinafter Wright & Miller].

As to defendant Purvis, neither the breach of contract nor conversion count of plaintiffs' complaint alleged facts which if proven would entitle the plaintiffs to recover from him. Count one of the complaint is for breach of contract and contains no allegations of any contractual relationship between Purvis and the debtor. This count merely alleges that as FMCC's agent, Purvis effectuated the breach of contract between FMCC and the debtor. Count two of the complaint, the tort claim, contains no allegations that defendant Purvis is retaining the proceeds individually for his own benefit; rather, count two of the complaint alleges that FMCC has converted funds of the debtor for its own use. While the plaintiffs have failed to allege a cause of action against defendant Purvis under a breach of contract or conversion theory, this does not end the inquiry.

The complaint may not be dismissed merely because plaintiff's allegations do not support the legal theory they intend to proceed on since this court is under a duty to examine the complaint to determine if the allegations provide for relief



on any possible theory. Robertson v. Johnston, 376 F.2d 43 (5th! Cir. 1967); Wright & Miller, supra. Although not designated as separate count, the plaintiffs have alleged an independent act by defendant Purvis, the act of entering Pineland State Bank and effectuating the revocation of debtor's line of credit and freezing of accounts, which under the standards for review at this point in the proceeding, raise sufficient allegations of the tort recognized under Georgia law as malicious interference with business relations. In establishing a cause of action for malicious interference with business relations, a plaintiff must demonstrate that the defendant (1) acted improperly and without privilege, (2) acted purposely, with malice, with the intent to injure, (3) acted to induce a third party or parties not to enter into or continue a business relationship with the plaintiff, and (4) for which the plaintiff suffered some financial injury. See, Hayes vs. Irwin, 541 F.Supp. 397, 429 (N.D. Ga. 1982). Malice, an injury and an independent wrongful act equals the tort of wrongful interference with business relations. Id. at 430. In the context of a wrongful interference with business relations, malice can be inferred from any unauthorized interference or any interference without justification or excuse. The act is malicious when done with knowledge of the plaintiff's right and with the intent to interfere with those rights. Luke v. Dupree, 158 Ga. 590, 596, 124 S.E. 13 (1924); Perry & Co. v. New South Insurance Brokers of

Georgia 182 Ga. App. 84, 354 S.E. 2d 852 (1987). Personal ill will or animosity is not essential to a finding of malice. Hayes supra. The plaintiffs in this case have alleged an independent act by Purvis, (entering the Pineland State Bank) and a financial injury (Pineland State Bank terminated its business relationship with the debtor). Malice may be inferred from the acts if proven. The complaint sets forth enough allegations to avoid a Rule 12(b)(6) dismissal as to defendant Purvis individually or in his capacity as agent for FMCC.

As to defendant FMCC and the basis upon which defendant asserts a failure of the plaintiffs to assert a cause of action upon which relief may be granted, neither 11 U.S.C. §541 nor §542 provide causes of action on either a breach of contract or conversion claim.

Bankruptcy Code §541 provides that the debtor's estate consists of the property of the debtor pre-petition and §542 provides that the court may issue orders compelling an individual or entity withholding property of the estate to turn that property over to the trustee or a debtor in possession as the case may be. Neither section creates a cause of action of any sort in the sense used in the complaint. Neither §541 nor §542 provide a "cause of action". These bankruptcy sections establish the jurisdiction of this court over pre-petition property of the estate. In this case, the purported property of the estate consists of possible state law

causes of action. The jurisdictional statement of the plaintiff that its causes of action arise under §541 and §542 are at best unartfully drawn. The complaint clearly describes the claims as arising out of breach of contract and conversion, and alludes to malicious interference with business relations state law causes of action. Accordingly, FMCC's argument concerning §541 and §542 does not warrant dismissal of the complaint pursuant to Bankruptcy Rule 7012 and Federal Rule of Civil Procedure 12(b)(6).

As to count one of plaintiff's complaint, the issue before the court is whether Georgia law including Georgia's version of the Uniform Commercial Code (O.C.G.A. §11-1-203) provides for a cause of action for breach of contract arising out of a breach of an implied covenant of good faith and fair dealing. FMCC in support of its motion to dismiss relies upon Management Assistance Inc. v.

Computer Dimensions, 546 F.Supp. 666 (N.D. Ga. 1982), aff'd, 747 F.2d 708 (11th Cir. 1984), for the proposition that Georgia does not recognize an implied duty of good faith and fair dealing. At least in part, the court's decision in the Computer Dimension case was based upon the absence of any Georgia authority on point, which in turn led the court to consider other authority; subsequent to that decision, however, the Georgia courts have had occasion to consider the "fair dealing" and "good faith" implied

covenant of a contract. In *Smithloff v. Besson*, 173 Ga. App. 870, 328 S.E.2d 759 (1985) the court held that every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement. Specifically the *Smithloff* court found that in a brokerage contract, the purchaser has a duty to seek diligently and in good faith to comply with all terms of the contract. Compliance with this required duty is a question of fact to be resolved by the trier of fact. *Id.* In the present case, the plaintiffs assert that while the terms of the contractual agreement between the debtor and FMCC may leave a great deal of discretion as to performance in the hands of FMCC that discretion is not limitless. Whether FMCC's actions were unreasonable to the extent that they exceeded a "good faith and fair dealing" requirement is a question of fact. If this is proven, then the plaintiffs would be entitled to recover for breach of contract to the extent of damages as can be established.

Even though Georgia law recognizes an obligation of good faith and fair dealing in every contract, defendants contend that dismissal is appropriate as plaintiffs have failed to allege any acts of dishonesty on the part of defendants. Official Code of Georgia Annotated (O.C.G.A.) §11-1-201 (19), Georgia's version of the Uniform Commercial Code, does define good faith as "honesty in fact in the conduct or transaction concerned." O.C.G.A. §11-1-203

imposes a standard of good faith on all contracts. Essentially, acting in good faith means acting "honestly, not arbitrarily and capriciously." Ginn v. Citizens and Southern National Bank, 145 Ga. App. 175, 243 S.E. 2d 528 (1978). The determination of whether a party to a contract acted in good faith is a question for the trier of fact. Id. O.C.G.A. §11-1-201 (19) provides a definition for good faith, a standard of proof necessary to demonstrate that a party has acted in bad faith. It is not necessary for a plaintiff to plead evidence so long as the complaint is sufficiently clear to allow the defendant to form a responsive pleading. In re: Fidelity Electric Co., supra. Plaintiffs having sufficiently alleged a cause of action to overcome a Rule 12(b)(6) motion to dismiss, further inquiry into the remaining contentions are unnecessary. When there is at least one ground upon which plaintiff is entitled to relief, a motion to dismiss under Rule 12(b)(6) must be denied. Rathborne v. Rathborne 683 F.2d 914 (5th Cir. 1982); Wright & Miller, supra.

It is the recommendation of this court that the United States District Court for the Southern District of Georgia deny the

defendants' motion to dismiss for failure to state a claim upon which relief may be granted.

As this adversary proceeding is a non-core proceeding

under 28 U.S.C. §157 and plaintiffs have demanded a jury trial to which they are entitled, and there being no provisions or authorization for jury trials in bankruptcy court, this court further recommends immediate withdrawal of the reference in this adversary proceeding.

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JOHN S. DALIS  
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia  
this 3rd day of March, 1989.